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IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUGLAS DRETKE,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICI CURIAE*, FORMER PROSECUTORS AND JUDGES, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals—in reinstating on remand from this Court its prior rejection of petitioner's claim that the prosecution had purposefully excluded African-Americans from his capital jury in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986)—so contravened this Court's decision and analysis of the evidence in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), that "an exercise of this Court's supervisory powers" under Supreme Court Rule 10(a) is required to sustain the protections against invidious discrimination set forth in *Batson* and *Miller-El* and the safeguards against arbitrary fact-finding set forth in 28 U.S.C. § 2254(d)(2) and (e)(1).

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former judges and prosecutors, identified in the Appendix, who maintain an active interest in the fair and effective functioning of the criminal justice system. *Amici* are deeply committed to ensuring that criminal trials, and especially death penalty proceedings, are conducted in an atmosphere free of racial prejudice. Plausible allegations of race discrimination in the courthouse itself severely discredit the administration of justice and diminish its authority. They must be scrupulously reviewed in order to preserve public confidence in the criminal justice system, to safeguard the democratic right of all citizens to be fairly considered for jury service, and to assure just and reliable outcomes for individuals facing loss of life or liberty through the criminal process.

Judges serve as the ultimate guardians of the judicial process. In that capacity, they "are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in [the] prohibition [against discrimination in the selection of jurors]." *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

For their part, prosecutors exercise their duties as officers of the court to enforce the criminal laws. This Court has repeatedly underscored "the special role" of the prosecutor to ensure that justice is done even at the expense of the legitimate prosecutorial interest in securing convictions. *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The prosecutorial function suffers when the criminal justice system

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief.

operates in a discriminatory manner, including all of those instances when counsel for any party uses peremptory challenges to exclude citizens from jury service based upon their race.

The question presented is critically important to the integrity of the trial process and to the effective administration of justice in a multi-racial society. Members of the bench and law enforcement officials also bear responsibility for maintaining a justice system that honors the equal treatment of all persons and instills trust in the citizenry it serves, conditions that are necessary to the effective administration of justice.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

For 125 years "this Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded." *Powers*, 499 U.S. at 404. The opinion of the Court of Appeals for the Fifth Circuit on remand directly conflicts with that precedent and threatens the public's confidence in the role of the jury and the rule of law.

The Court first considered this case on review of the Fifth Circuit's denial of petitioner's request for a Certificate of Appeal ("COA"). *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*"), J.A. 19-57. The Court ruled that the Fifth Circuit made two errors in applying the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") by (i) improperly deciding the merits of petitioner's appeal at the COA stage, and (ii) imposing an inappropriately high burden of proof. Accordingly, the Court reversed the denial of the COA and remanded the case to the Fifth Circuit for review

[2] *Amici* adopt the facts and procedural history set forth in petitioner's Brief on the Merits.

under the correct standard. *Miller-El I*, J.A. 32-38. Characterizing the Fifth Circuit's consideration of petitioner's evidence as "dismissive and strained" (*id.* at 34), this Court signaled its ongoing commitment to *Batson* through a detailed, although preliminary, consideration of petitioner's "extensive evidence concerning the jury selection procedures" (*id.* at 23) and an admonition that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review" or preclude relief. *Id.* at 31. The Court's opinion in *Miller-El I* therefore provided substantial guidance to the court below as to how it should approach its task on remand in determining whether petitioner had proved by "clear and convincing" evidence that the trial court erred in finding that no purposeful discrimination occurred during the selection of petitioner's jury. *Id.* at 31-32.

On remand, however, the Fifth Circuit rejected this Court's directives concerning how trial courts should evaluate evidence in the third step of a *Batson* inquiry and how appellate courts should review *Batson* claims under 28 U.S.C. § 2254(d)(2) & (e)(1). Instead, the Fifth Circuit adopted a framework that altered the three-step test announced in *Batson* and reaffirmed in *Miller-El I*. Even within its own analytical framework, the Fifth Circuit strained to deny petitioner relief by ignoring this Court's command to consider all of the circumstances surrounding the peremptory challenges and their legal import. For example, the Fifth Circuit ignored some of the most salient facts: stark racial disparity in the prosecution's use of its peremptory challenges and in its questioning of prospective jurors. This Court, however, had highlighted those items of evidence as the source of some of its deepest concerns. As to the evidence it did address, the Fifth Circuit omitted crucial portions of that evidence (*e.g.*, that the prosecution's jury shuffling was done when the front of the panel contained a significant number of African-Americans), and failed to consider whether the

totality of petitioner's circumstances was "clear and convincing" evidence that the trial court erred in declaring that no purposeful discrimination had occurred. The result on remand is not a failure of evidence, but rather a failure of analysis.

As officers of the court, *amici* are aware that too many citizens, particularly African-Americans, believe they do not receive equal treatment under the law when trials are decided by juries that are not representative of the community. *Amici* are likewise concerned that this belief undermines the public's confidence in the integrity of the criminal justice system. The public, the judiciary and the law enforcement community saw this Court's ruling in *Miller-El I* as a highly visible reaffirmation of the Constitutional principles set forth in *Batson*. The public, the judiciary and the law enforcement community are watching still.

Amici believe that anything less than a reversal of the Fifth Circuit's decision would send a highly visible, detrimental signal that this Court has retreated from its clear rulings in *Batson* and *Miller-El I*. The opinion on remand strikes at the very heart of the integrity of the criminal justice system. It undermines public confidence in the role of the jury and in the principle that redress of constitutional violations can be achieved through the process of judicial review. The Fifth Circuit's refusal to heed this Court's instructions on remand to consider *all* of petitioner's evidence in reaching the ultimate determination under the three-step test required by *Batson* and *Miller-El I* requires this Court to reverse the court of appeals' holding below and grant petitioner's requested relief.

ARGUMENT

I. RACIAL DISCRIMINATION IN THE USE OF PEREMPTORY CHALLENGES UNDERMINES THE INTEGRITY OF THE JUDICIAL SYSTEM.

When the Court first condemned the intentional exclusion of African-Americans from juries, it observed that jury service is a fundamental aspect of citizenship because it permits ordinary citizens to "participate in the administration of the law." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522 (1975). The opportunity to participate in the administration of justice through jury service significantly increases the public's trust in the fairness of the justice system as well as the results that the system produces.[3] "Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people." *Powers*, 499 U.S. at 407; *see also Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting) (jury service "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering . . . a respect for law").

By compromising the representative quality of the jury, race-based peremptory challenges "undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *see also Powers*, 499 U.S. at 411 ("racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process' and places fairness of a criminal proceeding in doubt") (citation omitted) (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). The diminished public confidence that results from discriminatory jury selection is of great concern to members of the judiciary

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[3] George W. Dougherty et al., *Race and the Georgia Courts: Implications of the Georgia Public Trust and Confidence Survey for Batson v. Kentucky and its Progeny*, 37 Ga. L. Rev. 1021, 1030-31 (2003) ("*Georgia Public Trust and Confidence Survey*").

and to law enforcement because of the wide ripple effects that a lack of public faith can cause. Prosecutors and judges depend upon the willingness of juries to convict when the evidence warrants, and that willingness is undermined when jurors lose faith in the fairness of the system. Accordingly, *Batson*'s rules apply to defense counsel as well, for wherever race is an issue—or even *perceived* to be an issue—it is essential that all ethnic groups in our diverse nation are satisfied that verdicts are the result of a fair jury selection process. *See Georgia v. McCullom*, 505 U.S. 42, 49, 54 (1992). Further, the Court must ensure that trial courts are "sensitive to the racially discriminatory use of peremptory challenges" in order to "enforce[] the mandate of equal protection and further[] the ends of justice." *Batson*, 476 U.S. at 99. These important judicial and law enforcement interests in the integrity of the jury system and in the public's acceptance of jury verdicts will be harmed without rigorous, steadfast enforcement of the Court's *Batson* jurisprudence.

Nearly 20 years after *Batson* was decided and petitioner was tried and sentenced to death, race discrimination still has not been eradicated from the jury selection process. The persistent unconstitutional use of peremptory challenges has been demonstrated by empirical studies.[4] The effect of this discrimination on the public's confidence in jury verdicts, and thus in the judicial process, is pronounced and deeply troubling to *amici*. In significant numbers, persons of color, particularly African-Americans, believe that they are not

[4] *See, e.g.*, Kevin Collison, *WNY Study Urges Increase in Ranks of Minority Jurors*, Buffalo News, Apr. 19, 2000, at A1, *available at* 2000 WL 5675310; Pennsylvania Supreme Court Comm. on Racial & Gender Bias in the Justice Sys., *Final Report* 50-102 (2003), *available at* http://www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.pdf (racial and ethnic bias in jury selection, including a summary of findings in other states); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3 (2001); Symposium, *Minnesota Court Task Force on Racial Bias in the Judicial System*, 16 Hamline L. Rev. 477 (1993).

afforded equality before the law and view juries as unrepresentative.[5] A 1999 survey undertaken by the National Center for State Courts to examine public attitudes toward the judicial system revealed that African-Americans and Hispanics were more likely than whites to agree that "[m]ost juries are *not* representative of the community."[6] The Georgia Public Trust and Confidence Survey, conducted at the request of the Georgia Supreme Court, also asked respondents whether most juries are *not* representative of the community. The Georgia study found that, whether or not they had served as jurors, a majority of whites agreed with the statement (57.3 percent compared to 53.5 percent). However, 66 percent of African-Americans who had no prior jury service agreed that juries are not representative of the community, compared to 46.7 percent of those who had sat as jurors.[7]

Amici believe that *Batson* offers the most effective, long-term safeguard against jury nullification as well as a vital means of ensuring public confidence in the verdict when there is a conviction.[8] Jury verdicts are most likely to be accepted by the public when they are the product of a diverse jury that is fairly selected.[9] A survey of jury-eligible individuals found that when the jury was diverse, the verdict—conviction or

[5] National Ctr. for State Courts, *How the Public Views the State Courts: A 1999 National Survey* 29-32, 37-38 (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf.

[6] *Id.* at 7, 29 (emphasis added).

[7] *Georgia Public Trust and Confidence Survey*, *supra*, at 1033.

[8] *See, e.g.*, Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. Mich. J.L. Reform 285, 316 (1999); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877, 937 (1999).

[9] *See, e.g.*, Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033 (2003).

acquittal—did not influence perceptions of the trial's fairness.[10] However, when the jury did not include minority members, observers viewed the trial as less fair if it produced a guilty verdict.[11] National conviction rates in felony cases are close to 90 percent.[12] "If the racial composition of a jury is more likely to affect perceptions of the fairness of the trial procedure when the trial results in a conviction, jury composition will be an important factor [in reinforcing perceptions of fairness] in a majority of criminal trials."[13]

Taken together, these results affirm that jury service tends to increase public confidence in the courts. The statistically significant differences in the views of those African-Americans who have served as jurors and those who have not provides evidence to support the Court's concern in *Batson* that excluding African-Americans from juries undermines perceptions of fairness in our system of justice.[14] *See Batson*, 476 U.S. at 87. This perception of fairness, in turn, is critical to ensuring both that jurors perform their sworn duties with dispassionate fairness, based only on the law and the facts, and that their judgments are accepted by the public. These elements are necessary for judges and prosecutors to effectively administer the criminal justice system in a multi-racial society.

The Court's opinion in *Miller-El I* sounded an important re-affirmation of *Batson's* mandate to eradicate racial discrimination in the jury selection process. *See, e.g.*, Shirley Baccus-Lobel, *Six Strikes and You're Safe: The All-White Jury*, 30 Litig. 14, 15 (2004) (In *Miller-El I*, "the Court

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[10] *Id.* at 1049.

[11] *Id.*

[12] *Id.* at 1049-50 & n.43 (citing Carol J. DeFrances & Greg W. Steadman, Bureau of Justice Statistics Bull., *Prosecutors in State Courts, 1996*, at 5 (1998)).

[13] *Id.* at 1050.

[14] *Id.* at 1044-45.

reinforced *Batson*'s promise of equal protection in the selection of citizens to judge matters of profound interest to both the parties and the community."); Kristy Bowling, *Miller-El v. Cockrell: Procedural Rules to Protect Prisoners' Rights*, 35 U. Tol. L. Rev. 723, 724 (2004) ("In *Miller-El* the Court reaffirmed the evidentiary framework and has strengthened the *Batson* Doctrine. In doing so, it not only helped guarantee a defendant's constitutional liberties but also worked toward ensuring all races are treated equally in our criminal justice system."). Failure to enforce this mandate will severely undermine public confidence in the integrity of the jury and the fairness of the justice system. No participants in the justice system, including judges and prosecutors, are served by that outcome.

II. THE FIFTH CIRCUIT DISREGARDED THE CLEAR PRECEDENT AND DIRECTIVES OF *BATSON* AND *MILLER-EL I*.

In *Miller-El I*, the Court held that the Fifth Circuit had applied an overly demanding standard, inconsistent with the AEDPA, to deny petitioner's request for a COA. J.A. 32. In a detailed, "threshold examination" of the record, this Court identified the evidence of racial discrimination in the selection of petitioner's capital jury that supported petitioner's *Batson* claim: disparate questioning of African-American jurors; striking African-American jurors for reasons that applied equally to white jurors; "shuffling" the jury panel when prosecutors "had no information about the prospective jurors other than their race" (*id.* at 25-26) to minimize the likelihood that African-American jurors would serve on the jury; and the continuing effect of discriminatory practices that had been institutionalized into the culture of the Dallas County District Attorney's office. *Id.* at 23-27, 33-37. The Court reversed the denial of the COA and remanded the case to the Fifth Circuit to review petitioner's claim on appeal "consistent with this opinion." *Id.* at 38.

On remand, the Fifth Circuit contravened this Court's decision and analysis of petitioner's evidence in *Miller-El I* in two important ways. First, the Fifth Circuit eliminated the crucial third step in the three-step test created in *Batson*, which requires reviewing courts to make a deferential, but nonetheless independent and critical assessment of whether the proffered reason for the peremptory strikes masked discriminatory intent. The Fifth Circuit's truncated two-step analysis contravenes *Batson* and, if followed by other courts, will essentially preclude any findings of purposeful discrimination in jury selection.

Second, contrary to the unambiguous instruction of this Court in *Miller-El I*, the Fifth Circuit failed to assess all of the circumstances surrounding the jury selection process in determining petitioner's claim. With regard to the evidence it did consider, the Fifth Circuit improperly applied the "clear and convincing" standard of proof against each *individual* evidentiary claim, rather than weighing the *totality* of the circumstances. Thus, on remand the Fifth Circuit strained to avoid the conclusion that flows ineluctably from a review of the evidence according to the framework prescribed by the Court in *Batson* and *Miller-El I*: petitioner has presented clear and convincing evidence that the trial court's factual determination that no purposeful discrimination occurred was incorrect.

A. The Fifth Circuit Eliminated The Third Step In The Three-Step Test Established By *Batson* And Reaffirmed By *Miller-El I* By Refusing Altogether To Review The Trial Court's Finding Of Credibility With Respect To The Prosecutors' Proffered Race-Neutral Justifications.

In *Miller-El I*, the Court directed the Fifth Circuit to undertake a review of petitioner's *Batson* claim under the provisions of 28 U.S.C. § 2254(d)(2) & (e)(1). J.A. 37-38. The only issue on remand was the third step of the *Batson* inquiry, where the "critical question" is the "persuasiveness

of the prosecutor's justification for his peremptory strike." *Id.* at 30. The Court furnished a blueprint for deciding the merits of petitioner's claim, "explain[ing] in some detail the extensive evidence concerning the jury selection procedures [during petitioner's trial]," which consisted both of facts "relating to a pattern and practice of race discrimination in the *voir dire*" and evidence "directly related to the conduct of the prosecutors in his case." *Id.* at 23. Addressing the proper standard for review under § 2254(d)(2) & (e)(1), the Court cautioned that "deference does not imply abandonment or abdication of judicial review." *Id.* at 31. It underscored that the statutory constraints of the AEDPA "do[] not by definition preclude relief," and that "[a] federal court can disagree with a state court's credibility determination" under either or both subsections of § 2254. *Id.*

The Fifth Circuit's opinion on remand undid entirely the Court's decision and analysis in *Miller-El I*. In evaluating whether purposeful discrimination occurred, the Fifth Circuit declared that "it is important to identify the prosecution's stated reasons for exercising a peremptory challenge. *Once we have identified the reasons for the strikes, the credibility of the reasons is self-evident.*" J.A. 8. (emphasis added).

The Fifth Circuit's alteration of the *Batson* test is remarkable on two fronts. First, the Court remanded this case for the Fifth Circuit to consider, and consider with some care in light of petitioner's weighty evidence, the question that lies at the very heart of *Batson*: whether petitioner met his burden of proving purposeful discrimination (in the context of federal habeas review). By declaring the prosecutors' race-neutral justifications "self-evident[ly]" credible, however, the Fifth Circuit eliminated the need to consider any evidence to evaluate the credibility of these justifications—the very analysis required by the third step of *Batson*. The Fifth Circuit has created a tautological framework for review of *Batson* challenges, which simply begs the very question that this Court expressly declared it should consider.

The Fifth Circuit's tautological framework further led it to ignore the factors identified by this Court as relevant to measuring the credibility of the prosecutors' justification for the peremptory strikes. As this Court instructed, credibility "can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." J.A. 30. The Fifth Circuit said nothing about the factors identified by this Court, and did not articulate or use any other factor for measuring the credibility of the prosecutors' explanations. It only said that the reasons were "self-evident[ly]" credible (*id.* at 8), which is to *decide* the credibility question rather than, as *Batson* requires, engaging in further analysis to determine whether the prosecution's explanations were in fact credible in light of the totality of petitioner's evidence. *See id.* at 40. Under its altered *Batson* test, the Fifth Circuit has eliminated its "duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98.

Second, and of greater significance beyond this case, the Fifth Circuit has created a new rule that converts *Batson*'s three steps into two. Following the Fifth Circuit's model, other appellate courts will accept race-neutral explanations as *self-evidently* credible, without considering the credibility of the explanations in their full context or determining, consistent with the demands of the Equal Protection Clause, whether the proponent has met his ultimate burden of persuasion. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam); *see also Batson*, 476 U.S. at 98 ("[i]f these general assertions [denying discriminatory motives] were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement'") (quoting *Norris v. Alabama*, 294 U.S. 587, 598 (1935)). Unless a lawyer fails to proffer *any* facially neutral reason at step two, every peremptory challenge exercised because of the juror's race will survive appellate review of a *Batson*

challenge under the Fifth Circuit's new analytical framework.[15] *No* amount of evidence of purposeful discrimination—short of direct evidence that the proffered reasons were lies—could overcome a prior determination that the proffered neutral reasons are "self-evidently" credible and therefore innocent in their intent.

Of equal importance to the public's confidence in the judicial system, and thus the ability of judges and prosecutors to administer that system, is the Fifth Circuit's departure from the rule that courts adhere to precedents. That rule "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). The supremacy of the law of the Constitution as announced by this Court, and the principle that lower courts follow these decisions, are integral to the conception of the "judiciary as a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines Inc.*, 398 U.S. 375, 403 (1970). As this Court has warned, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

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[15] Indeed, the Fifth Circuit's declaration that the prosecutors' race-neutral justifications for striking African-American jurors are "self-evident[ly]" credible could be seen to preclude the use of circumstantial evidence to prove purposeful discrimination. Circumstantial evidence was expressly declared relevant by this Court in *Batson*. 476 U.S. at 93 ("In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such *circumstantial* and direct evidence of intent as may be available'") (emphasis added) (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

Because the Fifth Circuit not only ignored the Court's carefully constructed analytical framework for assessing claims like petitioner's, but also created a rule that fundamentally departs from this Court's precedents in *Purkett*, *Hernandez v. New York*,[16] and *Batson* itself, reversal is warranted.

B. On Remand, The Fifth Circuit Improperly Evaluated Petitioner's Claim.

In *Miller-El I*, this Court provided substantial guidance to the Fifth Circuit as to how it should approach its task to determine whether petitioner proved by "clear and convincing" evidence that the trial court erred in finding that no purposeful discrimination occurred during the selection of petitioner's jury. J.A. 23-27, 33-37. The Fifth Circuit's cursory and dismissive review of petitioner's evidence on remand ignored this Court's instructions. First, the Fifth Circuit failed to consider all of petitioner's evidence, despite this Court's clear instruction that all of the "facts and circumstances" (*id.* at 31-32) must be evaluated, and failed to address the reasonable inferences of purposeful discrimination that, as this Court pointed out, could be drawn from the evidence. Second, where it did consider petitioner's evidence, the Fifth Circuit improperly applied the standard of review required under 28 U.S.C. § 2254(d)(2) and (e)(1) to safeguard against arbitrary fact-finding.

Given the preeminence of the Court's first decision in this case and its careful analysis of petitioner's evidence, *amici*'s greatest concern lies with the damage that the Fifth Circuit's decision on remand will do to the public reputation and integrity of our court system. While federal review on habeas should be conducted only within the relevant statutory and constitutional limitations, that review must take place—and must be conducted with reasonable care—if the public is to have confidence in the fairness and integrity of criminal

[16] 500 U.S. 352 (1991) (plurality opinion).

convictions. Cf. *Strickler*, 527 U.S. at 281 (the goals of the criminal justice system are not met when a guilty man is convicted by constitutionally improper means). Public confidence in prosecutors and judges cannot be maintained when federal courts decline to grant relief for constitutional violations when, as here, it is plainly warranted under the appropriate standards of review.

1. The Fifth Circuit Contravened this Court's Decision in *Miller-El I* by Refusing to Consider the Totality of Petitioner's Evidence.

The third step in the *Batson* test requires the court to evaluate all of the circumstances surrounding the exercise of peremptory challenges to determine whether a party improperly used a peremptory challenge to strike a juror because of his or her race. *Batson*, 476 U.S. at 93. Courts must inquire into "'such circumstantial and direct evidence of intent as may be available.'" *Id.* (quoting *Arlington Heights*, 429 U.S. at 266). This Court has never placed a limit on what evidence can be considered during the third *Batson* step. The circuit courts that have addressed this issue have adhered to this Court's unequivocal directive to consider all of the circumstances surrounding the peremptory challenges when determining, in the third step of the *Batson* test, whether purposeful discrimination occurred. *See, e.g.*, *United States v. Hill*, 146 F.3d 337, 342 (6th Cir. 1998) (affirming requirement under *Batson* that a court should "assess the totality of the circumstances surrounding the strike in the analysis of whether the defendants have met their ultimate burden of proving discrimination"); *see also Collins v. Rice*, 365 F.3d 667, 685 (9th Cir. 2004), *petition for cert. filed*, No. 04-52 (U.S. July 7, 2004); *Riley v. Taylor*, 277 F.3d 261, 283-84 (3d Cir. 2001) (en banc); *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000); *Coulter v. Gilmore*, 155 F.3d 912, 921-22 (7th Cir. 1998).

In *Miller-El I*, the Court reversed the denial of petitioner's COA, in part, because the Fifth Circuit failed to consider all of the circumstances surrounding the peremptory challenges. J.A. 31-32 ("[i]t goes without saying that . . . the facts and circumstances that were adduced in support of the prima facie case" are to be considered at Batson's third step). Indeed, the Court went to great lengths to reinforce the breadth of evidence that should be considered in analyzing whether a defendant has shown purposeful discrimination, explaining in *Miller-El I* that a *Batson* claim "can be supported by *any* evidence demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based." *Id.* at 31 (emphasis added).[17] On remand, however, the Fifth Circuit ignored the Court's express directive:

a. Most remarkably, the Fifth Circuit did not once acknowledge that prosecutors used peremptory strikes to remove 91 percent of the eligible African-American prospective jurors and only 13 percent of the white jurors. This particular piece of evidence is significant in two respects: (1) it is powerful circumstantial evidence of discriminatory intent (2) that this Court itself took note of and

[17] In *Miller-El I*, J.A. 32, this Court cited *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141-49 (2000), which held that all evidence, including evidence used to establish a *prima facie* case, can be used to demonstrate purposeful discrimination in an action under Title VII of the Civil Rights Act of 1964. This Court has acknowledged that cases interpreting Title VII of the Civil Rights Act of 1964 are highly relevant in explaining the evidentiary rules that govern allegations of discrimination in jury selection in the post-*Swain* era. *Swain v. Alabama*, 380 U.S. 202 (1965). *See, e.g.*, *Purkett*, 514 U.S. at 768-69; *Hernandez*, 500 U.S. at 359-60 (plurality opinion); *Batson*, 476 U.S. at 94 n.18, 98 n.21. Like the *Batson* test, the test for employment discrimination using indirect evidence is a three-step test, where the ultimate burden of persuasion remains on the party challenging an action as discriminatory. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

concluded that "[h]appenstance is unlikely to produce this disparity." J.A. 33.

b. The Fifth Circuit also improperly dismissed the historical evidence as "less significant" because petitioner had "already met the burden under the first step of *Batson* and now must prove actual pretext in his case." J.A. 7. The Fifth Circuit declared, as a matter of law, that historical evidence of persistent, purposeful discrimination against African-Americans in jury service was less relevant in determining whether the prosecutors' race-neutral justifications were a pretext for purposeful discrimination. *Id.* This is the same error the Fifth Circuit made when this case first appeared before this Court in *Miller-El I*. *Id.* at 31-32. The totality of the circumstances *means* the totality of the circumstances, and a circumstance does not become less relevant in a *Batson* inquiry merely because it serves a dual purpose of establishing a prima facie case *and* proving purposeful discrimination. This Court found that the historical evidence of discriminatory practices in the Dallas County District Attorney's Office plainly cast doubt on the legitimacy of the prosecutors' use of peremptory challenges at the first step of the *Batson* test, and that it just as plainly cast doubt on the legitimacy of those strikes in the third step of the *Batson* inquiry. *Id.* at 36-37.[18] The Fifth Circuit's attempt to pigeon-hole the use of evidence to one step in the *Batson* inquiry would preclude judges from fulfilling their "duty to determine if the defendant has established purposeful discrimination" by

[18] Moreover, this historical evidence was inextricably intertwined with the conduct of the prosecutors in selecting the jury at petitioner's trial. *Both* of petitioner's prosecutors had been members of the Dallas County District Attorney's Office when that agency formally trained its lawyers to exclude minorities from jury service, and one of the prosecutors had been found by a Texas appellate court to have engaged in race-based jury selection in another capital trial. J.A. 37. This crucial aspect of petitioner's historical evidence led to this Court's "supposition that race was a factor" in the prosecution's jury selection methods. *Id.* Yet, the Fifth Circuit ignored this evidence entirely in its opinion.

considering all of the circumstances that touch upon the credibility of the prosecutors' explanations for the peremptory challenges. *Batson*, 476 U.S. at 98; *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) (evidence of purposeful discrimination should not be "pigeon-holed" but should assist the trier of fact "in determining overall intent").

c. The Fifth Circuit disregarded specific conclusions drawn by this Court—readily apparent from its threshold inquiry—that "[d]isparate questioning did occur" and that the manipulative questioning regarding the minimum punishment for murder was almost exclusively directed at African-Americans who expressed ambivalence about the death penalty. J.A. 34-35. Likewise, the Fifth Circuit improperly dismissed circumstantial evidence in addressing the issue of disparate questioning, departing again from this Court's guidance in *Miller-El I* that "'under some circumstances proof of discriminatory impact may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.'" *Id.* at 36 (quoting *Batson*, 476 U.S. at 93).

In sum, the Fifth Circuit failed to consider all of the circumstances presented by petitioner, and the reasonable inferences therefrom, contravening this Court's analysis of the evidence and its instructions on remand. Refusing to consider the totality of the circumstances renders unreasonable the Fifth Circuit's determination that the trial court did not err in finding no purposeful discrimination. *Cf. Williams v. Taylor*, 529 U.S. 362, 397 (2000) (the Virginia Supreme Court's determination of prejudice on ineffective assistance of counsel claim under § 2254(d)(1) was "unreasonable insofar as it failed to evaluate the totality of the available . . . evidence"). Moreover, such selective consideration of the evidence severely undermines public confidence in the judicial system as a forum to vindicate and remedy equal protection violations.

2. The Fifth Circuit's Divide-and-Conquer Approach Did Not Properly Evaluate Whether Petitioner Presented Clear and Convincing Evidence that the Trial Court Erred.

To the extent the Fifth Circuit addressed petitioner's evidence, it viewed each piece of evidence in isolation, finding that no *individual* item of evidence was "clear and convincing" proof that the trial court erred in finding no purposeful discrimination occurred. J.A. 7, 13, 14.[19] The Fifth Circuit's "divide-and-conquer" approach to the evidence effectively abandoned the statutory safeguards set forth in 28 U.S.C. § 2254(e)(1).

A determination under *Batson* that no purposeful discrimination occurred in the selection of a jury is a finding of fact. J.A. 30. Under the AEDPA, findings of fact by the trial court are "presumed to be correct," unless petitioner presents "clear and convincing" evidence in the federal habeas proceeding to rebut this presumption. 28 U.S.C. § 2254(e)(1). Whether a party has satisfied the "clear and convincing" burden of proof is determined by reviewing all of the evidence put forth by that party; each single piece of evidence is not required to satisfy the burden individually. *See, e.g., Colorado v. New Mexico*, 467 U.S. 310 (1984) (finding entire record of evidence presented to special master did not meet "clear and convincing" standard of proof necessary for state to obtain equitable apportionment of river water by diversion); *Baumgartner v. United States*, 322 U.S. 665, 671 (1944) (court determined that the "whole mass of

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[19] The Fifth Circuit's sole acknowledgement that it is required to undertake an analysis of the totality of petitioner's evidence appears at the conclusion of the opinion. The appellate court comments that petitioner's evidence does not indicate by clear and convincing evidence that the trial court erred "either collectively or separately." J.A. 17-18. But its opinion betrays no sign that the court of appeals actually undertook an examination of the totality of the evidence. *See id.* at 7, 13, 14.

evidence" in record below did not satisfy the "clear and convincing" standard of proof necessary to denaturalize a citizen).

The Fifth Circuit's treatment of petitioner's evidence concerning "jury shuffles" typifies its "divide-and-conquer" approach. Petitioner presented evidence that the prosecutors requested "jury shuffles" to alter the racial composition of the panel. Specifically, prosecutors requested "shuffles" when there were African-American jurors seated in the front of the panel in order to move the African-American jurors towards the back of the panel. There, they would likely never be questioned during voir dire and would therefore be excused at the end of the week, even though jury selection was still in progress. J.A. 25-26. Prosecutors also objected to the "purported inadequacy" of a defense shuffle but only "after the postshuffle panel composition revealed that African-American prospective jurors had been moved forward," increasing the likelihood those jurors would be empanelled. *Id.* at 26. This Court concluded that this evidence "tended to erode the credibility" of the state's justifications, noting that its concerns were "amplified" by evidence that "the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past." *Id.* at 36. On remand, however, the Fifth Circuit mentioned only that the defense sought more "jury shuffles" than the prosecution, without addressing the manner, circumstances, or timing of any shuffle, and then concluded that the evidence concerning jury shuffles—and jury shuffles *alone*—was not "clear and convincing" evidence that the trial court erred in finding no purposeful discrimination occurred in the jury selection process. *Id.* at 7.

Courts cannot determine whether purposeful discrimination occurred in jury selection by considering "each piece of evidence . . . in isolation." *Riley*, 277 F.3d at 283. In determining purposeful discrimination in a party's use of peremptory challenges, "[t]he whole may be greater than the

sum of its parts," *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998), and the "ultimate determination on the issue of discriminatory intent [is] based on all the facts and circumstances." *Alvarado*, 923 F.2d at 256 (evidence should not be "pigeon-holed" but should assist the trier of fact "in determining overall intent").[20] Evidence of purposeful discrimination is often circumstantial rather than direct, and an intent to discriminate becomes apparent only when a court views all such circumstantial evidence together and in combination with each other piece. *See, e.g., Hernandez*, 500 U.S. at 363 (plurality opinion) ("'[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . .'") (alteration in original) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).[21]

This Court recognized in *Miller-El I*, as it has before, that violations of constitutional rights are not rendered immune from judicial correction merely because they are bound up in the findings of fact by a lower court:

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by the AEDPA, conclude the decision was unreasonable or that the

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[20] The "divide and conquer" strategy used by the Fifth Circuit here has been rejected by this Court in other contexts where courts are required to review the totality of the circumstances. *See United States v. Arvizu*, 534 U.S. 266, 274-75 (2002) (the Ninth Circuit's "divide-and-conquer" analysis of the evidence was inconsistent with the duty of the court of appeal to review the "'totality of the circumstances'" surrounding a *Terry* stop).

[21] The requirement that courts consider the totality of the circumstances to safeguard and enforce constitutional protections against discrimination is acknowledged in other contexts involving racial discrimination. *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (existence of "'hostile'" or "'abusive'" environment under Title VII "can be determined only by looking at *all the circumstances*") (emphasis added).

factual premise was incorrect by clear and convincing evidence.

J.A. 31.[22] Arbitrary findings of fact, either that discrimination has occurred or that discrimination has not occurred, should not be insulated from judicial review and remedy, for the public's confidence in the fair and equal administration of justice is diminished when criminal convictions are allowed to stand on arbitrary findings of fact. The Fifth Circuit's "divide-and-conquer" approach compartmentalized each piece of evidence for consideration, rather than weighing the "clear and convincing" nature of *all* of the evidence against the trial court's final conclusion. The result of this unfair contest gives "deference" to factual determinations that is neither sanctioned by this Court nor tolerable under § 2254.

While this case is a benchmark, the nature of the benchmark remains undetermined. The Fifth Circuit's revision of step three of the *Batson* inquiry risks insulating invidious discrimination by "'those . . . of a mind to discriminate,'" *Batson*, 476 U.S. at 96, by eliminating the role and duty of judges—whether at trial or on direct or collateral review—to gauge the credibility of the explanations for peremptory challenges based on the totality of the evidence. Unless these explanations can be tested against the weight of all the evidence, it becomes impossible to "erode the credibility of the [opponent's] assertion" sufficient to carry the ultimate burden of persuasion. J.A. 36; *see also Hernandez*, 500 U.S. at 369 (plurality opinion). The result,

[22] *See also Norris v. Alabama*, 294 U.S. 587, 589-90 (1935):

> That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of the evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights.

exemplified by the outcome on remand, is that meritorious *Batson* challenges become a futile exercise.

* * * *

Judges and prosecutors must each day contend with a public that only tentatively places its trust in our judicial system. The Court's decisions in *Batson* and *Miller-El I* help secure the public's confidence in the criminal justice system, and the judges and prosecutors responsible for its administration. A decision like the Fifth Circuit's, however, will have a negative effect on the day-to-day activities of our colleagues charged with making this system work. The Fifth Circuit's alteration of the *Batson* inquiry, and its departure from the Court's decision and analysis in *Miller-El I*, warrants reversal and a grant of relief.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Fifth Circuit and grant petitioner a new trial.

Respectfully submitted,

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